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IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

FREEMAN AYERS, ET AL.,
Respondents.

On Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

BRIEF *AMICI CURIAE* OF THE COALITION FOR ASBESTOS JUSTICE, INC., NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, AMERICAN CHEMISTRY COUNCIL, AND AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

The Coalition for Asbestos Justice, Inc. ("Coalition") was formed in 2000 as a nonprofit association to address and improve the asbestos litigation environment. Established by property and casualty insurers, the Coalition's mission is to encourage fair and prompt compensation to deserving current and future asbestos litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[2] In important cases that may have a significant impact on the asbestos litigation environment, the Coalition files *amicus curiae* briefs before state courts of last resort and the United States Supreme Court.

The National Association of Manufacturers ("NAM") – "18 million people who make things in America" – is the nation's largest and oldest multi-industry trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. Headquartered in Washington, D.C., the NAM has 10 additional offices across the country.

The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth, and to increase understanding among policymakers, the media and the general public about the importance of manufacturing to America's economic strength. The NAM's membership includes virtually all classes of defendants in all industrial sectors.

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[2] The Coalition for Asbestos Justice, Inc. includes the following: ACE-USA, Chubb and Son, CNA service mark companies, Fireman's Fund Insurance Company, The Hartford Financial Services Group, Inc., Argonaut Insurance Co., General Cologne Re, Liberty Mutual Insurance Group, the St. Paul Fire and Marine Insurance Company, and the Great American Insurance Company.

The American Tort Reform Association ("ATRA"), founded in 1986 and based in Washington, D.C., is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms who have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over a decade, ATRA has filed *amicus curiae* briefs in cases before this Court that have addressed important liability issues.

The American Chemistry Council ("Council") represents the leading companies engaged in the business of chemistry. Council members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. The Council is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $460 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

The American Petroleum Institute ("API") is a nationwide, not-for-profit trade association representing over 400 companies engaged in all aspects of the petroleum industry, including exploration, production, refining, transportation and marketing. API frequently represents its members in judicial matters affecting the United States petroleum industry.

SUMMARY OF ARGUMENT

This country is in the midst of "an asbestos-litigation crisis." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997). The courts themselves are partly to blame. "The

judiciary has been handling the asbestos litigation for a generation, and its management of the litigation has contributed to what is now called a crisis but may better deserve to be termed a disaster." *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the House Comm. on the Judiciary*, 106th Cong. at 43 (July 1, 1999) (statement of Professor William N. Eskridge, Yale Law School) [hereinafter "Eskridge Testimony"].

The courts have undoubtedly acted with the best of intentions. But individual courts are poorly situated to deal with a national problem of this scope and complexity, and their rulings, taken together, have only aggravated the situation. Courts that have abandoned traditional procedural protections and substantive limits on recovery have generated a flood of new claims, mostly by unimpaired or mildly impaired plaintiffs. Payments to those claimants have encouraged still more filings at the same time that they have forced scores of companies into bankruptcy. Those bankruptcies, in turn, have put mounting pressure on the remaining solvent defendants and encouraged plaintiffs and their lawyers to seek out defendants with ever more attenuated connections to asbestos. Now those companies themselves are beginning to collapse, in a "domino effect" that could play out on a broad scale for many years to come.

Within this context, the instant case exemplifies the nationwide asbestos-litigation crisis. It involves a group of plaintiffs who are, at best, mildly impaired, suing a defendant with a connection to asbestos that is, at best, attenuated, seeking to recover damages on a bare claim of emotional distress. And the case arises in a state that has developed a reputation for subordinating the procedural rights of defendants in a misguided effort to promote the "efficient" handling of asbestos claims.

This brief focuses on the second issue presented to the Court: whether defendants under the Federal Employers' Liability Act ("FELA") may be held 100 percent liable for damages even where they are only minimally to blame. The West Virginia courts' imposition of joint liability under FELA is contrary both to the statute, evolving common law principles, and sound public policy. Like the lower court's ruling with respect to recovery for emotional distress, the lower court's ruling on apportionment, if left undisturbed, will only accelerate the most damaging trends of the current crisis.

ARGUMENT

I. RULINGS LIKE THE ONES AT ISSUE HERE ARE CONTRIBUTING TO AN ACKNOWLEDGED "ASBESTOS-LITIGATION CRISIS."

A. The Crisis.

When asbestos product liability lawsuits emerged almost thirty years ago,[3] nobody could have predicted that courts today would be facing what this Court has aptly termed an "asbestos-litigation crisis." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997). The Occupational Safety and Health Administration ("OSHA") promulgated its first asbestos regulation in 1971, and followed up with increasingly stringent regulations in the years to follow.[4] By the early 1970s, "use of new asbestos essentially ceased in

[3] *See Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973).

[4] OSHA was created in 1970 and almost immediately promulgated an initial regulation limiting exposure to asbestos. *See* 36 Fed. Reg. 10466, 10506 (table G-3) (May 29, 1971). Soon thereafter, OSHA revised its regulations to limit exposure still further and to require special handling of asbestos products. *See* 36 Fed. Reg. 23207 (Dec. 7, 1971); 37 Fed. Reg. 11318 (June 7, 1972). OSHA's asbestos regulations became progressively more restrictive until they effectively precluded the use of asbestos in most commercial applications.

1970s, "use of new asbestos essentially ceased in the United States." *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 737 (Bankr. E. & S.D.N.Y. 1991) (Weinstein, J.), *vacated*, 982 F.2d 721 (2d Cir. 1992), *opinion modified on reh'g*, 993 F.2d 7 (2d Cir. 1993) (reviewing history of asbestos use). Therefore, many believed that asbestos litigation would be a serious but diminishing problem. *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial Advoc. 247, 248 (2000) [hereinafter "Schwartz & Lorber"].

The opposite is true. Instead of declining, asbestos filings are multiplying exponentially. In 1991, approximately 100,000 asbestos cases were pending in courts around the country. By 1999, that number had doubled to roughly 200,000. *See The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the House Comm. on the Judiciary*, 106th Cong. at 5 (July 1, 1999) (statement of Prof. Christopher Edley, Jr., Harvard Law School) [hereinafter "Edley House Testimony"]. New cases are now filed at a rate greater than ever before. In 2001 alone, plaintiffs filed at least 90,000 new claims. *See* Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. Times, Apr. 10, 2002, at A1 [hereinafter "Berenson"]. Up to 700,000 more cases are expected by the year 2050. *See Mass Tort Litigation Report Discusses Resolving Asbestos Cases Over Next 20 Years*, 14 Mealey's Litig. Rep.: Asbestos 22 (June 18, 1999). All told, the number of future claimants could reach as high as 3.5 million. *See* Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States And Members of the Judicial Conference of the United States* 5 (Mar. 1991) [hereinafter "Judicial Conference Report"].

In short, "the asbestos litigation crisis not only remains with us, but has in important respects grown worse." *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on S. 758, Before the Senate Judiciary Comm.*, 106th Cong. at 1 (Oct. 5, 1999) (statement of Prof. Christopher Edley, Jr., Harvard Law School); Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise*, L.A. Times, Dec. 17, 2001, at A1; Eric Roston, *The Asbestos Pit*, Time, Mar. 11, 2002, Y9.

In 1991, the Judicial Conference described a looming "disaster of major proportions." Judicial Conference Report at 2. Since that time, the rate of new filings and the mounting number of pending cases have only exacerbated the crisis. Long delays in resolving claims remain routine. *See* Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 394 (1993)) [hereinafter "Edley & Weiler"]. Bankruptcies increasingly threaten the ability of asbestos defendants to compensate seriously ill plaintiffs, now and in the future. Transactional costs "consume more and more of a relatively static amount of money to pay [] claims." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 865 (1999) (Rehnquist, C.J., concurring). The total cost to the economy is staggering.[5]

B. The Courts' Contribution to the Crisis.

The origins of the wave of asbestos litigation that began in the 1970s are well known. In the 1940s and 1950s, mil-

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[5] Ratings agency A.M. Best estimates that asbestos litigation already has cost American companies over $21.6 billion, and may cost another $43.4 billion over the next 20 years. *See* Christopher Oster, *Some Insurers Face Shortfall in Reserves for Costly Claims Related to Asbestos*, Wall St. J., May 7, 2001, at A4. At least one consulting firm has put the total future cost of the litigation at $200 billion. *See Tillinghast-Towers Perrin Estimates Claims Associated with U.S. Asbestos Exposure Will Ultimately Cost $200 Billion*, June 13, 2001, http://www.towers.com/towers/locations/uk/press%20release/06-13-01.html.

lions of American workers were exposed to asbestos, usually with few or no precautions. Resulting illnesses began to appear by the 1960s, and, because some asbestos-related diseases have latency periods of up to 40 years, injuries continued to emerge in later decades. Recent estimates suggest that hundreds of thousands of Americans were injured by exposure to asbestos and that thousands have died or will die as a result. *See* Edley & Weiler at 388-89. Absent congressional action – and, despite pleas from this Court, other courts, and the Judicial Conference, none has been forthcoming[6] – it was inevitable that asbestos litigation would present a major problem for the courts.

What is harder to understand is why a problem that should have begun to resolve itself by now has instead worsened dramatically. It is here that the courts themselves share some of the blame. With the best of intentions, many courts have adopted both procedural and substantive rules intended to facilitate resolution of asbestos claims – to put money in the hands of the sick as quickly as possible, and also to clear court dockets of overwhelming numbers of cases. Those efforts have been massively counterproductive. Lowering the legal barriers to recovery may seem attractive in individual cases, but in the aggregate, it only fuels the fire, inviting

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[6] *See Ortiz*, 527 U.S. at 821 ("[T]he elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation."); *id.* at 865 ("'[T]he elephantine mass of asbestos cases' cries out for a legislative solution.") (Rehnquist, C.J., joined by Scalia and Kennedy, J.J., concurring) (internal citation omitted); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 313 (5th Cir. 1998) ("There is no doubt that a desperate need exists for federal legislation in the field of asbestos litigation.") (internal citation omitted); *State ex rel. Mobil Corp. v. Gaughan*, No. 30314, 2002 WL 745965, at *5 (W. Va. Apr. 25, 2002); *State ex rel. Appalachian Power Co. v. MacQueen, III*, 479 So. 2d 300, 304 (W. Va. 1996); Judicial Conference Report at 3 ("The Committee firmly believes that the ultimate solution should be legislation . . . creating a national asbestos dispute resolution scheme . . . .").

more and more claims with little regard for merit. *See* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

1. *Procedural Shortcuts.* Faced with hundreds or even thousands of asbestos claims on their dockets, courts have struggled to find ways of speeding final decision or settlement. One "near-heroic effort[] . . . to make the best of a bad situation," *Ortiz*, 527 U.S. at 865 (Rehnquist, C.J., concurring), involved mass settlements of hundreds of thousands or even millions of claims aggregated under Rule 23 of the Federal Rules of Civil Procedure. But that route was invalidated by the Court in *Amchem* and *Ortiz*: even the most pressing efficiency interests, the Court held, cannot justify the lumping together of disparate and fact specific claims for settlement purposes. *See Amchem*, 521 U.S. at 620-29; *Ortiz*, 527 U.S. at 841-61.

Other courts – including those in West Virginia – have turned to mass joinders and "jumbo" consolidations, aggregating thousands of claims against dozens or hundreds of defendants in an effort to produce quick settlements with low transaction costs. *See* Eskridge Testimony at 13 (describing pressure on defendants to settle on terms favorable to plaintiffs). Typically, the claims are so disparate – injured plaintiffs joined with the unimpaired, plaintiffs exposed to asbestos in different settings and even in different decades – that they would not remotely qualify for aggregation under normal circumstances. *See* Schwartz & Lorber at 256-57 ("In other cases that do not involve asbestos, judges would not consolidate or join cases when plaintiffs suffer completely different types of injuries."). In the asbestos context, however, courts see no choice but to forgo standard procedural protections in an effort to streamline resolution of claims.

Even if this trade-off were acceptable – and *Amchem* and *Ortiz* suggest strongly that it is not – it has proven en-

tirely counterproductive. As it turns out, bending procedural rules to put pressure on defendants to settle, *see* Eskridge Testimony at 39-40, brings no lasting efficiency gains. Rather than making cases go away, it invites new ones. As Professor Eskridge explains, "[J]udicial experimentation has sacrificed both [procedural protections] and efficiency, by helping create a juggernaut whereby jumbo settlements generate more lawsuits." *Id.*; *see also* Schwartz & Lorber at 249. This effect should not be surprising:

> Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.

Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997).[7]

West Virginia is a case in point. The West Virginia courts believe that they have no choice but to "adopt diverse, innovative, and often non-traditional judicial management techniques to reduce the burden of asbestos litigation." *State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300, 304 (W. Va. 1996). In practice, this has meant two mass asbestos trials, with a third scheduled for this fall. But this judicial "innovation" – the consolidation of tens of thousands

[7] *See also* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 Tex. L. Rev. 1821, 1822 (1995) ("The more successful judges become at dealing 'fairly and efficiently' with mass torts, the more and larger mass tort filings become."); Hon. Helen E. Freedman, *Product Liability Issues in Mass Torts – View from the Bench*, 15 Touro L. Rev. 685, 688 (1999) (judge overseeing New York City asbestos litigation stating that "[i]ncreased efficiency may encourage additional filings and provide an overly hospitable environment for weak cases.").

of disparate claims regardless of the risk of prejudice or judicial confusion – has not solved West Virginia's asbestos problem. Instead, it has aggravated it, by encouraging both in- and out-of-state potential plaintiffs to take advantage of West Virginia's plaintiff-friendly procedural regime. As one West Virginia trial judge involved in asbestos litigation has ruefully acknowledged:

> I will admit that we thought that [an early mass trial] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. That when we could whack that batch of cases down that well, it drew more cases.

In re Asbestos Litig., Civ. Action No. 00-Misc.-222 (Cir. Ct. Kanawha Cty., W. Va. Nov. 8, 2000) (transcript of hearing before Judge John A. Hutchinson). In short, gross procedural shortcuts have not only failed to solve the asbestos-litigation crisis; they have themselves become part of the problem.

2. *Unimpaired or Mildly Impaired Plaintiffs.* The courts' substantive rulings in asbestos cases also have contributed to the litigation crisis. Of special concern are substantive rules – like the one below – that make it easier for unimpaired or only mildly impaired plaintiffs to recover. It is by now widely acknowledged that claims by the relatively unimpaired are at the heart of the continuing asbestos-litigation crisis. *See* Mark Behrens & Monica Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 Tex. Tech. L. Rev. 1 (2001).

Some unimpaired plaintiffs, though they have been exposed to asbestos, show no physical symptoms at all. Others show "pleural plaques" or "pleural thickening," physical

changes in the lungs that do not affect lung functions and do not necessarily lead to or increase the risk of asbestos-related disease. Mild forms of asbestosis, a set of lung disorders, also may be present without significant impairment or any medical link to more severe illnesses, such as cancer. What all of these unimpaired or less-impaired plaintiffs have in common is that they do not suffer from the kinds of asbestos-related cancers – most often, mesothelioma – or severe asbestosis prevalent in asbestos plaintiffs of earlier decades. *See* Edley & Weiler at 393; Eskridge Testimony at 8.

In *Amchem*, 521 U.S. at 629, Justice Breyer observed that "up to one half of asbestos claims are now filed by people who have little or no physical impairment." That number may be conservative. For instance, Professor Edley estimated in 1992 that claims by unimpaired plaintiffs then accounted for 60 to 70 percent of new claims, with the trend toward unimpaired claimants steadily increasing. *See* Edley House Testimony at 5. Some current estimates are as high as 90 percent. *See* Jennifer Biggs *et al., Overview of Asbestos Issues and Trends* 3 (Dec. 2001). Whatever the precise percentage, mass filings by unimpaired or mildly impaired claimants are the "wild card" that caused earlier predictions of a decline in litigation to be so far off the mark.

The problem presented by these claims is self-evident: they divert scarce resources from the truly ill claimants who need them most. Backlogs of claims by the unimpaired or mildly impaired slow the judicial process, delaying resolution for those with fatal diseases and elderly claimants. Payments to the unimpaired or mildly impaired are rapidly exhausting limited assets that should go to "the sick and the dying, their widows and survivors." *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000), *cert. denied sub nom. Collins v. Mac-Millan Bloedel, Inc.*, 532 U.S. 1066 (2001) (internal

citation omitted).[8] Indeed, lawyers who represent asbestos plaintiffs with cancer share this concern, recognizing that recoveries by the unimpaired may so deplete available resources that their clients will be left without compensation. *See "Medical Monitoring and Asbestos Litigation" – A Discussion with Richard Scruggs and Victor Schwartz*, Vol. 17, No. 3 Mealey's Litig. Rep.: Asbestos, Mar. 1, 2002, at 39 (Scruggs: "Flooding the courts with asbestos cases filed by people who are not sick against defendants who have not been shown to be at fault is not sound public policy.").

Several factors help to explain this phenomenon. Some plaintiffs exposed to asbestos may feel compelled to file suit despite the absence of symptoms for "fear that their claims might be barred by the statute of limitations if they wait until such time, if ever, that their asbestos-related condition progresses to disability." *In re Asbestos Cases*, 586 N.E.2d 521, 523 (Ill. App. 1991); *see also The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the House Comm. On the Judiciary*, 106th Cong., at 4 (July 1, 1999) (statement of Dr. Louis Sullivan, former Secretary, U.S. Department of Health and Human Services). Other plaintiffs, aware that many asbestos defendants are filing for bankruptcy, may seek compensation now because they worry that it will not be available later.

Again, however, the courts' own rulings in asbestos cases contribute to the problem. Rulings like the one below have on a systemic level opened the floodgates to claims by unimpaired or mildly impaired plaintiffs. Some courts have done this simply by recognizing as a compensable injury pleural thickening, visible only on an x-ray and harmless. *See* Edley

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[8] *See also* Susan Warren, *As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J., Apr. 25, 2002, at A1; Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced As the Medically Unimpaired File Claims*, Wall St. J., Dec. 14, 2001, at B6.

House Testimony at 5. Others have allowed unimpaired claimants to sue for medical monitoring. In *Metro-North Commuter Railroad Company v. Buckley*, 521 U.S. 424 (1997), this Court refused to authorize an asbestos-related medical monitoring claim under FELA, recognizing that such a claim would extend to "tens of millions of individuals," expose defendants to unlimited liability, and thus drain the pool of resources available for meritorious claims by plaintiffs with serious present harm. *Id.* at 442. Nevertheless, a minority of states, including West Virginia, permit medical monitoring claims under state law. *See Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W. Va. 1999).[9]

Finally, there are the claims based on fear of future injury that are at issue in this case. *See* James A. Henderson, Jr. & Aaron D.Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815 (forthcoming 2002) (lodged with Court). There is no question but that emotional injuries may be compensable under common law. The issue in this case is whether, as the West Virginia courts have held, asbestos plaintiffs should be freed under FELA of the general common law requirement that emotional injuries be manifested in some objective form. That requirement, as the Court explained in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 557 (1994), is necessary to prevent "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." If the decision below is permitted to stand, it will invite a whole

[9] Two states that have more recently addressed medical monitoring have concurred in this Court's reasoning and rejected medical monitoring claims. *See Badillo v. Am. Brands, Inc.*, 16 P.3d 435 (Nev. 2001); *Hinton v. Monsanto Co.*, 2001 WL 1073699 (Ala. Sept. 14, 2001).

new generation of filings by unimpaired or mildly impaired plaintiffs.

Thus, substantive rulings regarding unimpaired or mildly impaired plaintiffs have, like procedural shortcuts, become a part of the very problem they are designed to address. However well-intentioned, they inevitably encourage plaintiffs to sue even in the absence of any serious injury, and encourage aggressive lawyers to seek out new clients.[10] The upshot, of course, is that judicial resources and defendant assets are diverted from the truly sick claimants who need them most.[11]

3. *Peripheral Defendants.* A final development for which the courts must accept some responsibility is the degree to which asbestos litigation has come to focus on defendants whose involvement is peripheral, at best. The first step in this direction came in the 1980s and 1990s, as asbestos claimants and their lawyers turned their attention from asbestos producers to large companies who had purchased those businesses in the 1960s and 1970s – well after the conduct giving rise to liability had occurred and then ceased. *See* Edley House Testimony at 8.

At one step further removed are the defendants being sued today: defendants, like the railroads in this case, with

[10] *See In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 748 (describing lawyers who have "arranged through the use of medical trailers . . . to have x-rays taken of thousands of workers without manifestations of disease and then filed complaints for those that had any hint of pleural plaques"); Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. News & World Rep., Dec. 17, 2001, at 36 (lawyers advertise with solicitations reading: 'Find out if YOU have MILLION DOLLAR LUNGS!'").

[11] *See* Roger Parloff, *The $200 Billion Miscarriage of Justice; Asbestos Lawyers are Pitting Plaintiffs Who Aren't Sick Against Companies that Never Made the Stuff – and Extracting Billions for Themselves*, Fortune, Mar. 4, 2002, at 154.

only the most attenuated connection to the original wrongdoing that gave rise to the asbestos-litigation crisis. These defendants are involved solely by virtue of the fact that they used products that contained some form of asbestos, or have asbestos on their premises. *See* Schwartz & Lorber at 262-63; *see also* Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14 ("[T]he net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing."); Editorial, *The Job-Eating Asbestos Blob*, Wall St. J., Jan. 23, 2002, at A22.

The spread of asbestos cases can be charted simply by looking at the number of defendants brought into the litigation. In the early to mid-1980s, before this latest development, approximately 300 defendants had been named in asbestos cases. *See* James S. Kakalik *et al.*, *Variation in Asbestos Litigation Compensation and Expenses* vii (RAND Inst. for Civil Justice 1984). Today, that number stands in the thousands. *See* Douglas McLeod, *Asbestos Continues to Bite Industry*, Bus. Ins., Jan. 8, 2001, at 1. And it includes such household names as Ford Motor Co., Campbell Soup Co., AT&T Corp., AT&T Corp., and 3M Co., the maker of Scotch™ tape and Post-it™ notes, *see* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1 – none of which could be described as "asbestos companies" and none of which had any part in the making and marketing of asbestos that gave rise to today's claims. *See* Schwartz & Lorber at 263-64. As one attorney involved in the litigation has stated, "Asbestos litigation has turned into a search for the [next] solvent bystander." Berenson at A1 (quoting W.R. Grace counsel David Bernick). *See also* Richard B. Schmitt, *How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial*, Wall St. J., Mar. 5, 2001, at A1.

One of the explanations for this phenomenon is obvious. Most of the early targets of asbestos litigation – the producers and suppliers of asbestos in the 1940s and 1950s – paid billions of dollars in damages and then declared bankruptcy. Plaintiffs and their lawyers were forced to expand their "search for deep pockets" – first to corporate successors of the original defendants, and then, as those companies began to experience their own financial difficulties, to today's outer ring of peripheral defendants. *See* Edley & Weiler at 384, 394-95; *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. at 747-48 (a "newer generation of peripheral defendants are becoming ensnarled in the litigation" as plaintiffs' lawyers seek "to expand the number of those with assets available to pay for asbestos injuries" even where extent of liability is unknown); Michael Freedman, *The Tort Mess*, Forbes, May 13, 2002, at 95.

To date, more than 57 companies have been driven into bankruptcy. *See* Mark A. Behrens, Editorial, *When the Walking Well Sue*, Nat'l L.J., Apr. 29, 2002, at A12. In the last two years this process has accelerated dramatically, forcing at least 18 companies with more than 100,000 employees into bankruptcy. *See* Berenson at A1.[12] More companies will follow, probably by the end of this year. *See* Deborah Hensler *et al.*, *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 50 (RAND Inst. for Civil Justice, 2001) (preliminary report) (predicting that "[a]ll of the major asbestos defendants are likely to be in bankruptcy within 24 months."). Each new bankruptcy puts "mounting and cumulative" financial pressure on the remaining defendants, whose resources are limited, *see* Edley & Weiler at 392, and

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[12] Employers that have recently declared bankruptcy include Owens Corning, Babcock & Wilcox Co., Pittsburgh Corning Corp., Armstrong World Industries, Inc., Federal-Mogul Corp., USG Corp., W.R. Grace & Co., G-I Holdings, Inc. (formerly known as GAF Corp.), Kaiser Aluminum Corp., Porter-Hayden Co., A.P. Green Industries, Inc., Harbison-Walker Refractories Co., Shook & Fletcher Insulation Co., and North American Refractories Company.

removes one more source of funds from the pool available to asbestos claimants. *See* Mark D. Plevin & Paul W. Kalish, *What's Behind the Recent Wave of Asbestos Bankruptcies?*, Mealey's Litig. Rep.: Asbestos, Vol. 16, No. 6., Apr. 20, 2001.

To the considerable extent that their rulings in asbestos cases have contributed to these bankruptcies, the courts themselves are indirectly responsible for the search for peripheral defendants that follows. Some courts have aggravated the problem more directly, through rulings that – like the one below – impose a strict form of joint and several liability on asbestos defendants. One of the things that makes a suit against a peripheral defendant attractive is that under a regime of joint and several liability, a plaintiff may recover *all* of his damages from such a defendant, even if the defendant is only very marginally responsible and other defendants (like original asbestos producers) deserve vastly more of the blame. Joint and several liability also makes suits against peripheral defendants more devastating. Some of the new class of attenuated defendants already are beginning to collapse under the weight of the claims against them. *See Engineering Firm Burns & Roe Files for Reorganization, Cites Recent Spike in Claims*, Vol. 15, No. 23 Mealey's Asbestos Rptr., Jan. 5, 2001. Joint and several liability can only accelerate this process, further threatening the ability of asbestos claimants to recover for their injuries.

* * *

The courts' best efforts to address the asbestos-litigation problem have backfired, and helped to turn a problem into a crisis. Procedural shortcuts dispose of cases only to have them replicated two-fold. Short-sighted substantive rules help to assure that an ever-increasing proportion of claims are filed by the least impaired against the least responsible, while other defendants are forced into bankruptcy and plaintiffs with greater needs are left with fewer resources for compensation. As this Court has recognized already, the only real solution to the problem is national legislation. *See Amchem*, 521 U.S. at 628-29; *Ortiz*, 527 U.S. at 821; *id.* at 865 (Rehnquist, C.J., concurring). *See also* Michael E. Baroody, Editorial, *Litigation by Healthy Hurting Real Asbestos Victims*, Houston Chron., May 16, 2002, at 33A. Such legislation, however, can come only from a *legislature*, not from courts "stepping up" to legislate away traditional procedural and substantive rights. Until such legislation is enacted, this Court should insist that the lower courts return to sound rules of procedure and substance – rules that move valid cases properly through the court, apportion responsibility fairly among defendants, and preserve limited resources for the claimants most in need. *See* Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve The Asbestos Litigation Crisis*, Briefly, Vol. 6, No. 6, June 2002 (Nat'l Legal Center for the Pub. Interest monograph).

II. LIABILITY SHOULD BE APPORTIONED FAIRLY UNDER FELA.

The court below instructed the jury that if it found the railroad defendant liable in the slightest degree for respondents' asbestos-related injuries, it should hold the defendant responsible for 100 percent of the respondents' damages. Under the West Virginia ruling, that would be true even if a respondent's injuries were caused in greater part by some entirely independent exposure to asbestos, such as more lengthy employment with another employer. The West Virginia rule would also make the railroad fully liable for injuries that, while in some small part railroad-related, could be traced principally to other parties like asbestos manufacturers and suppliers.

The court based its instructions on the traditional doctrine of joint liability, commonly called joint and several liability. That doctrine – followed in West Virginia and a small minority of the states – provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant will be liable for the total amount of damages rather than a share based on comparative responsibility. *See Coney v. J.L.G. Indus., Inc.*, 454 N.E.2d 197 (Ill. 1983). This Court should decline to incorporate the doctrine of joint liability into FELA. That kind of full joint liability is contrary to evolving common law principles and entirely inconsistent with FELA's comparative negligence regime. In the asbestos context, it is also very bad public policy, contributing to the spiral of bankruptcies and the litigation's recent spread to peripheral defendants.

A. Evolving Common Law Principles Support Proportionate, Not Joint, Liability.

In construing FELA, the Court relies significantly on common law principles. Where those principles are "not expressly rejected in the text of the statute, they are entitled to great weight in [the Court's] analysis." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994); *see also id.* at 558 (Court is to "develop a federal common law of negligence under FELA, informed by reference to the evolving common law"); *Metro-North Commuter R.R. Co.*, 521 U.S. at 429 (quoting *Gottshall*). The relevant text in this case can hardly be said to "expressly reject[]" common law principles calling for apportionment of liability; if anything, it suggests an intent to provide compensation only when an employee is injured by the fault of his employer, and not by off-the-job causes. *See* 45 U.S.C. § 51 (railroad carrier "shall be liable in damages to any person suffering injury *while he is employed by such carrier*") (emphasis added). Accordingly, common law principles carry substantial weight in this case.

Over the past several decades, the shortcomings of joint liability rules have become increasingly apparent. Most obviously, joint liability is unfair: in many of its operations, it means that a defendant only minimally at fault bears a disproportionate burden. Joint liability is also inefficient. Negligent actors who know that other defendants may bear the full costs of their behavior are encouraged to under-insure and discouraged from adopting safety measures. Conversely, by vastly increasing the exposure of defendants who are only marginally at fault, joint liability may encourage risk-averse behavior that is socially unproductive.[13]

Recognizing the harms that may flow from application of full joint liability, a substantial majority of states – thirty-five of fifty – have abolished or modified the traditional doctrine. *See* Restatement (Third) of Torts: Apportionment of Liability § 17 cmt. a (2000) (surveying state joint liability laws) [hereinafter "Restatement"]; *see also* Victor E. Schwartz, *Comparative Negligence* app. b (3d ed. 1994 & Supp. 1999) [hereinafter "Schwartz"].[14] As the Restatement explains,

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[13] For instance, joint liability has contributed to the decisions of manufacturers of protective sporting goods equipment, such as safety helmets, to withdraw products from the market or refrain from introducing new products. Joint liability also contributed to a serious public health crisis that threatened the availability of implantable medical devices, such as pacemakers, heart valves, artificial blood vessels, and hip and knee joints. Companies ceased supplying raw materials and component parts to medical implant manufacturers because, under a joint liability regime, they found that the potential costs of litigation far exceeded potential sales revenues. The crisis was resolved only by congressional legislation, the Biomaterials Access Assurance Act of 1998, 21 U.S.C. §§ 1601 to 1606 (2001). *See generally* Victor E. Schwartz & Mark A. Behrens, *A Proposal for Federal Product Liability Reform in the New Millennium*, 4 Tex. Rev. L. & Pol. 261, 297 (2000).

[14] Several liability is also supported by federal law in labor cases, *see Vaca v. Sipes*, 386 U.S. 171, 197-98 (1967), and Comprehensive Environmental Response, Compensation, and Liability Act cases. *See United States v. Hercules, Inc.*, 247 F.3d 706, 717-18 (8th Cir.), *cert. denied sub*

"[t]he clear trend over the past several decades has been a move away from joint and several liability." Restatement § 17 Rptrs.' Note cmt. a.

As of 2000, fifteen states had entirely abolished joint liability and replaced it with pure several liability, under which each defendant is liable for its proportionate share of fault for the harm. *See id.* Several states accomplished this reform through judicial decision. *See Brown v. Keill*, 580 P.2d 867 (Kan. 1978); *Prudential Life Ins. Co. v. Moody*, 696 S.W.2d 503 (Ky. 1985); *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992); *cf. Anderson v. O'Donohue*, 677 P.2d 648 (Okla. 1983) (abolishing joint liability where plaintiff was at fault); *Washburn v. Beatt Equip. Co.*, 840 P.2d 860 (Wash. 1992) (same). Some states have generally eliminated joint liability, but carved out narrow exceptions in which joint liability is retained. *See, e.g.*, Idaho Code § 6-803 (Michie 2001) (exempting cases arising out of a violation of state or federal law related to hazardous waste or an action arising out of the manufacture of medical devices or pharmaceutical products); Mich. Comp. Laws §§ 600.6304(4), 600.6312 (2001) (exempting certain medical malpractice claims and criminal conduct involving gross negligence or the use of alcohol or drugs). About a dozen states have abolished joint liability in cases where the defendant's comparative responsibility is below some threshold level. *See, e.g.*, N.H. Rev. Stat. Ann. § 507:7-e (2001) (abolishing joint liability for defendants less than 50% at fault); Wisc. Stat. Ann. § 895.045(1) (West 2002) (abolishing joint liability for defendants found to be less than 51% at fault).

For present purposes, whether these numerous joint liability reforms were accomplished by way of judicial deci-

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nom. Crompton Co./Cie v. United States, 122 S. Ct. 665 (2001); *United States v. Township of Brighton*, 153 F.3d 307, 319 (6th Cir. 1998).

sion or statute is unimportant. Statutory changes may alter the common law as surely as judicial decisions. This Court recognized the relationship between statutory reform and common law in *Morange v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), which involved a claim for wrongful death under maritime law. The Court ruled that although maritime law had not historically permitted recovery for wrongful death, "the wholesale abandonment" of this rule through the adoption of state wrongful-death statutes altered the common law. *See id.* at 389-91. The Court explained:

> The statutes evidence a wide rejection by the legislatures of whatever justifications may have once existed for a general refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.

Id. at 391 (citing James M. Landis, *Statutes and the Sources of Law*, in Harvard Legal Essays 213, 226-27 (1934)). "It has always been the duty of the common-law court," the Court continued, "to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherent body of common-law principles – many of them deriving from earlier legislative exertions." *Id.*

That leaves just a distinct minority of fifteen jurisdictions that have yet to abolish or modify their joint liability rules. *See* Restatement § 17 Rptrs.' Note cmt. a. West Virginia is among those states. But that fact does not justify the decision below. West Virginia courts hearing FELA actions are required to apply federal law, not their own state law. *See*

Dice v. Akron, Canton, & Youngstown R.R., 342 U.S. 359, 361 (1952). There is no reason why FELA, which looks to prevailing common law principles for its content, should incorporate a rule that has been rejected by a large and growing majority of states.

B. Joint Liability is Inconsistent With FELA's Comparative Negligence Regime.

The contributory negligence doctrine prohibits a plaintiff who is negligent in any degree from recovering any portion of his damages, even from a defendant who bears more responsibility for the harm. That was the almost uniform rule in the United States – until 1908, when FELA was enacted. FELA expressly abrogated the common law contributory negligence rule, providing instead that even negligent plaintiffs may recover that portion of their damages attributable to their employers. *See* 45 U.S.C. § 53 ("the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee"). FELA thus became a forerunner of a more general shift away from contributory negligence and toward comparative fault regimes.

It would be especially incongruous to import a joint liability rule for defendants into a statute that eliminates contributory negligence for plaintiffs. Joint liability and contributory negligence have their source in the same general theory: that parties may be responsible for *all* of the consequences of their actions. If a defendant's negligence causes an accident, then that defendant is liable for all of the resulting injuries, regardless of whether other defendants share the blame; and if a plaintiff's negligence contributes to an accident, then that plaintiff must bear the cost of the resulting injuries, regardless of whether others might also bear responsibility. Taken together, joint liability and contributory negligence at least have the virtue of consistency. *See, e.g., Teepak, Inc., v. Learned*, 699 P.2d 35, 39 (Kan. 1985) ("when the plaintiff had to be totally without negligence to recover . . . an argument could be made which justified [joint liability]").

The move from contributory negligence to comparative fault, however, eliminates one side of this rough equation. Comparative fault is grounded in a very different principle: that liability should be assessed in relation to fault, and apportioned fairly based on each party's individual responsibility. Once that principle is adopted with respect to plaintiffs – as it is in FELA's § 53 – it is difficult to justify imposition of joint liability, which allows for liability disproportionate to fault, on the other side of the ledger. *See* U.S. Senator Larry Pressler & Kevin V. Schieffer, *Joint and Several Liability: A Case For Reform*, 64 Denv. U.L. Rev. 651 (1988); 2 American Law Institute, *Enterprise Responsibility for Personal Injury -- Reporters' Study* 149 (1991).

Several states have relied on precisely this potential inconsistency in abandoning joint liability for rules that apportion liability more fairly among defendants. In *McIntyre v. Balentine*, 833 S.W.2d 52, 58 (Tenn. 1992), for instance, the Tennessee Supreme Court held that joint and several liability became "obsolete" once the court adopted comparative negligence in place of the old contributory negligence rule. The court explained:

> Our adoption of comparative fault is due largely to considerations of fairness: the contributory negligence doctrine unjustly allowed the entire loss to be borne by a negligent plaintiff, notwithstanding that the plaintiff's fault was minor in comparison to defendant's. Having thus adopted a rule more closely linking liability and fault, it would

> be inconsistent to simultaneously retain a rule, joint and several liability, which may fortuitously impose a degree of liability that is out of all proportion to fault.

Id. The Kentucky Supreme Court reached the same conclusion in *Dix & Assocs. Pipeline Contractors, Inc., v. Key*, 799 S.W.2d 24, 27-28 (1990), reasoning that the same "fundamental fairness" concerns that led it to replace the contributory negligence bar with a comparative fault rule also mandated elimination of joint and several liability. And in *Teepak, supra*, the Kansas Supreme Court put it this way:

> The legislature [in adopting comparative fault] intended to equate recovery and duty to pay to degree of fault. Of necessity, this involved a change of both the doctrine of contributory negligence and of joint and several liability. There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them.

699 P.2d at 39 (internal quotation omitted); *see also Hurt v. Freeland*, 589 N.W.2d 551 (N.D. 1999) (to same effect).

The same reasoning, of course, applies to FELA. Congress, in adopting § 53, "intended to equate recovery and duty to pay to degree of fault." *Teepak*, 699 P.2d at 39. Under that principle, joint liability has no more place than contributory negligence. *See Dale v. Baltimore & Ohio R.R. Co.*, 552 A.2d 1037, 1041-42 (Pa. 1989) (policy behind § 53 compels conclusion that joint liability is inapplicable under FELA).

C. Joint Liability is Inconsistent With Sound Public Policy.

As discussed briefly above, *see supra* Part I, application of full joint liability, under FELA as in other contexts, contributes significantly to the asbestos-litigation crisis. Joint liability leaves even the most peripheral asbestos defendants vulnerable to the same bankruptcies that inflicted their predecessor defendants, by vastly increasing potential exposure. Those bankruptcies – especially in combination with the flood of claims by unimpaired plaintiffs – increasingly threaten the ability of the neediest claimants to recover adequate compensation. *See* Amity Shlaes, *The Real-life Tragedy of the Asbestos Theatre*, Fin. Times, May 14, 2002, at 15. Adoption of proportionate liability as the rule under FELA, on the other hand, would help to slow the pace of asbestos-related bankruptcies and preserve assets for the truly sick.

Joint liability also encourages suits against the most peripheral asbestos defendants: so long as defendants only very marginally responsible for asbestos-related injuries may be held liable for full damages, they are inviting targets. But peripheral defendants like the railroad in this case – distributors and retailers of products containing asbestos and other employers who use those products – are almost by definition not 100 percent to blame for asbestos-related injuries. These defendants had no control over the actions of asbestos manufacturers that originally produced this crisis, and they had no specialized knowledge of the risks of asbestos exposure or the ways to combat those risks. It is fundamentally unfair to hold such defendants fully liable for injuries caused primarily by other, far more culpable actors.

Amici believe that the fairest resolution, and also the one most likely to assist in alleviating the asbestos-litigation crisis, is the adoption of pure several liability, or "fair share"

liability, in FELA cases. Under a several liability regime, peripheral defendants would be responsible only for the damages caused by their own negligence, and not for the misconduct of others. This approach has strong support in prevailing common law principles, having been adopted by at least 15 states, *see* Restatement, *supra*, and is the most consistent with FELA's comparative fault regime. The Court has ample basis for holding that pure several liability, rather than the pure joint liability imposed below, is the appropriate rule under FELA.

It should be noted, however, that while fair share liability is the soundest rule to adopt for FELA cases, it is not the only alternative open to this Court. Many states have taken something other than an "all or nothing" approach, modifying joint liability to more fairly apportion damages without abandoning it altogether. *See* Restatement, *supra*. Indeed, "[m]ore jurisdictions have some form of a hybrid system than have either pure joint and several or pure several-liability systems." *Id.* And any approach that allows for at least some degree of apportionment based on individual responsibility can be justified by reference to the same equitable principles that underlie § 53. In short, a "hybrid" approach might also be supportable under FELA.

One of the limited modifications to joint liability has become known as the "California approach," after a voter referendum approved in that state in 1986. *See* Cal. Civ. Code § 1431.2 (2001). Under California law, defendants are liable only for their "fair share" of responsibility for a claimant's *noneconomic* damages, i.e., "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation." Cal. Civ. Code 1431.2(b)(1). With respect to *economic* damages – medical expenses, lost earnings, property losses, and the like, *see* Cal. Civ. Code 1431.2(b)(2) –

joint liability governs, ensuring that claimants can recover full compensation for such losses. The same approach has been adopted by Nebraska. *See* Neb. Rev. Stat. § 25-21,185.10 (2001). And other states have adopted similar provisions. *See* Iowa Code § 668.4 (2001) (abolishing joint liability for noneconomic damages and abolishing joint liability for economic damages for defendants less than 50% at fault); N.Y. C.P.L.R. Law §§ 1601-1602 (Consol. 2001) (abolishing joint liability for noneconomic damages for defendants less than 50% at fault, with certain exceptions); Ohio Rev. Code Ann. § 2315.19 (Anderson 2001) (abolishing joint liability for noneconomic damages when the plaintiff was contributorily negligent or impliedly assumed the risk that caused the harm).

The California rule works, and would be fair in asbestos cases.[15] As the Restatement explains:

> Treating economic damages as a higher priority than noneconomic damages for joint and several liability has substantial, although not universal, support both in theory and practice. Many no fault compensation systems evidence a primary concern with replacing an injured plaintiff's lost wages and medical expenses and providing adequate compensation for future losses of those types, while eschewing payment for pain, suffering, and other noneconomic loss. While tort law and joint and several liability are not a no-fault compensation system, the

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[15] There have been virtually no reported cases in California involving disputes over whether a given loss should be characterized as economic or noneconomic. *See* Restatement § E18 cmt. c. California's law also has survived scrutiny under the state and federal equal protection clauses. *See Evangelatos v. Superior Ct.*, 753 P.2d 585 (Cal. 1988).

> choices made in the latter reflect the priority for compensation for economic loss.

Restatement § E18 cmt. D.

Finally, there is support for this approach in federal law. Under the federal Volunteer Protection Act of 1997 and No Child Left Behind Act of 2001, several or "fair share" liability is adopted for noneconomic damages only.[16] Recovery of economic damages, on the other hand, is governed by state law. This allows for joint liability as to economic damages in the minority states that have retained the doctrine, but avoids the creation of new liability for defendants in states that have abolished or modified the doctrine.

Adoption of "fair share," or several, liability under FELA would be the most effective way to avoid imposing unfair burdens on peripheral defendants, curb asbestos-related bankruptcies, and preserve assets for the truly sick. If the Court declines to adopt pure several liability under FELA, then the California rule may provide an alternative. The one approach that makes no sense at all is that adopted below: a pure joint liability rule that is inconsistent with evolving common law principles, FELA's own approach to apportionment, and sound public policy.

CONCLUSION

For the foregoing reasons, *amici* request that this Court set aside the judgment below and order a new trial in this case.

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[16] *See* 42 U.S.C. § 14504 (2001) (abolishing joint liability for noneconomic damages in actions against volunteers of nonprofit organizations); Pub. L. No. 107-110, § 2367, 115 Stat. 1670 (2002) (to be codified at 20 U.S.C. § 6737) (abolishing joint liability for noneconomic damages in actions against teachers, principals, school board members, and other school professionals).

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